

Nel & Others v Cilliers

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(197/2023) [2024] ZASCA 57 (19 April 2024)

INTRODUCTION

This case was heard by the Supreme Court of Appeal (“SCA”) on appeal from the full bench of the High Court. This case involved issues related to the National Credit Act and the enforceability of certain contract clauses. The SCA had to establish whether a sale of shares agreement which included financing provisions constituted a “credit agreement” for purposes of the National Credit Act. Specifically, did the lender’s failure to register as a credit provider make the agreement unenforceable, making it impossible to recover the advanced amount? This article looks into the decision and its significant implications for persons who lend or receive money.

SUMMARY OF THE CASE

In 2006, Mr Cilliers (the “respondent”) was developing an upmarket golf estate through Legend Golf and Safari (Pty) Ltd (the development company). Mr Nel (the “first appellant”) approached him and showed an interest in investing in the development. The appellant purchased shares in the company which was developing a golf estate. Due to the restructure in the company in 2007, there were shares available for purchase and the respondent recruited major new investors from Kuwait. The first appellant did not approve of the new investors, resulting in him wanting to exit as a shareholder. The respondent decided to make an offer to purchase the shares from the first appellant for R30 million as he believed that the development would yield good returns. This agreement would be for a period of three years, interest free and tax friendly.

The respondent failed to pay the remaining amount after three years and only paid R6 million. The parties then entered into a second agreement and the share price was reduced to R12 million, this amount was to be paid by the respondent in three equal instalments, with interest added. The respondent only made payment of R1 million and no other payment was made in terms of the second agreement. As a result, the first appellant and several of his businesses, referred to as the “appellants” approached the High Court for relief.

During the pre-trial phase, the appellants made several detrimental admissions that ultimately worked against them. These included the claims that the relevant provisions of the second agreement were subject to the National Credit Act No. 34 of 2005 (“NCA”), that these provisions could not be severed, and that none of the appellants had registered as credit providers as required by the NCA.

According to the ruling of the court of first instance, the second agreement was found to be illegal and unenforceable, and the parties had abandoned the original agreement. In accordance with the full bench’s ruling on appeal, the agreements were declared illegal and unenforceable due to several reasons, including noncompliance with the NCA. The NCA requires adherence to various contractual requirements, such as consensus, capacity, certainty, legality, and formalities.

RULING OF THE SUPREME COURT OF APPEAL

Following the comparison of the agreements, the SCA held that the second agreement was illegal and unenforceable because it was not in line with the NCA. Thus, the appellants could only depend on the validity of the initial agreement. When the respondent defaulted on the first agreement, the parties entered into a second agreement because they believed the first agreement to be legal and enforceable, according to the SCA’s assessment of whether the first agreement was simulated, inchoate, or abandoned.

The Court cited the portion of the Act that deals expressly with what defines a credit agreement for the purposes of the Act in its decision about the NCA’s applicability to the first arrangement. According to Section 8(4)(f) of this section, “any other agreement... in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee, or interest is payable to the credit provider” is included as a “credit agreement.”

The SCA ruled that, although there was no “charge, fee, or interest” payable by the respondent on the purchase of shares, the evidence suggested a sale of shares where the parties’ purpose was always for the respondent to

repay the sum advanced by the first appellants. Only R7 million was given to the first appellant, who had invested R8 million in the property. The Court determined that the first agreement did not qualify as a credit agreement for the purposes of the Act; as a result, the first appellant's inability to register as a credit provider did not render the agreement unlawful.

The respondent was directed by the court to reimburse the appellants for a portion of the money they had been advanced in connection with the share sale.

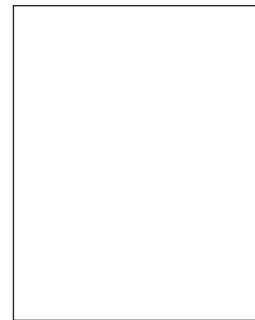
IMPORTANCE OF THE DECISION BY THE SCA

According to the ruling, a credit agreement must include both a deferral of payment and interest charges to be in compliance with the NCA, rather than just a deferral of payment alone. Any credit arrangement that a credit provider enters into is null and void if the credit provider is required by Section 40(4) of the NCA to register as a credit provider and has not done so. As a result, in situations like this, there is a significant chance that a creditor won't be able to collect unpaid balances owed under a contract. When there is a payment delay without interest, the arrangement does not qualify as a credit agreement for the purposes of the NCA, hence this risk does not exist. If the agreement is not a credit agreement for the purposes of the NCA, that is, if there is a payment deferral with no interest assessed, then this risk does not materialize. As a result, the creditor will still have the authority to uphold the contract or void it and demand compensation. The ruling also demonstrates that if interest is assessed in connection with a postponed payment, the NCA will be applicable unless the creditor can demonstrate that a different legislative exception applies (Section 4).

The many requirements of the Act, such as credit provision and enforcement procedures, are not necessary for a party to follow when it is not advancing credit to which the NCA is applicable. While this may not provide much solace to individuals in the credit business, it is undoubtedly comforting for those engaging in one-time transactions wherein funds are supplied without any interest being charged. Lenders must register as credit providers and ensure their contracts align with NCA requirements. Parties cannot contract out of the NCA, and any attempt to do so would be void.



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